

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX**

GORDON HEALTH VENTURES d/b/a
ROLLING HILLS MANOR¹

Employer

and

Case 6-RC-12195

UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, LOCAL 23, AFL-CIO,
CLC²

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Employer, Gordon Health Ventures d/b/a Rolling Hills Manor, herein called the Employer, operates a personal care home in Pittsburgh, Pennsylvania, herein called the "Employer's facility". The Petitioner, United Food and Commercial Workers International Union, Local 23, AFL-CIO, CLC, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of registered nurses, herein called RNs, and licensed practical nurses, herein called LPNs. A hearing officer of the Board held a hearing and the parties filed timely briefs with me.

As evidenced at the hearing and in the briefs, the parties disagree on the supervisory status of the RNs and LPNs. The Employer contends that the RNs and LPNs are supervisors within the meaning of the Act and that the petition should be dismissed, while the Petitioner

¹ The Employer's name appears as amended at the hearing.

² The Petitioner's name appears as amended at the hearing.

contends that neither the RNs nor the LPNs possess or exercise any supervisory authority. The unit sought by the Petitioner has approximately 6 employees.³

I have considered the evidence and the arguments presented by the parties on this issue. As discussed below, I have concluded that the RNs and LPNs at the Employer's facility are not supervisors within the meaning of the Act. Accordingly, I have directed an election in a unit that consists of approximately 6 employees.

To provide a context for my discussion of the issue, I will first provide an overview of the Employer's operations. Then, I will present in detail the facts and reasoning that supports my conclusion on the issue.

I. OVERVIEW OF OPERATIONS

The Employer operates a personal care home,⁴ which currently has 84 residents. The facility has two levels, both of which have resident rooms. The first level has 13 rooms and the second level has 26 rooms. The resident rooms are located in four sections of the facility.⁵ In this operation, the Employer employs approximately 50 employees.

The overall operations of the Employer are the responsibility of President and Interim Administrator James Cox.⁶ Reporting directly to Cox are the following seven department directors: Director of Resident Care/Director of Nursing, hereinafter referred to as the DON,⁷

³ At the time of the hearing, there were two RNs and three LPNs working at the facility. The record reflects that a sixth LPN had been hired and was scheduled to begin employment shortly after the hearing in this matter.

⁴ At the hearing, the parties stipulated, and I find, that the Employer is a health care institution within the meaning of Section 2(14) of the Act.

⁵ These sections are known as peach hall, lower peach hall, green hall and catered living.

⁶ Cox has held the position of President for approximately 6 months. The record indicates that Cox is considered a corporate employee and, in his capacity as President, he has responsibility for other facilities owned by the Employer. Before becoming President, Cox held the position of Administrator and Chief Operating Officer. It appears that the position of Administrator is currently vacant and the duties of Administrator are being performed by Cox. Accordingly, I will refer to Cox as the Administrator.

⁷ The record establishes that the titles of Director of Resident Care and Director of Nursing (DON) are used interchangeably. Barbara Haberstock considers both titles to apply to her.

Director of Housekeeping, Maintenance Director, Dietary Director, Activities Director, Business Office Manager and Marketing Director.⁸ The interim Administrator and the various department directors work day shift hours from Monday to Friday.⁹ The record establishes that Cox and the DON are available on a 24-hour-per-day basis.¹⁰

DON Barbara Haberstock is responsible for the nursing department. She oversees the resident care administered by the RN/LPN shift supervisors (also referred to in the record as charge nurses) and the nursing assistants (also referred to in the record as aides and resident care aides). These employees work on three shifts: from 7 a.m. to 3:30 p.m.; from 3 p.m. to 11:30 p.m. and from 11 p.m. to 7:30 a.m. Unlike the DON, the shift supervisors and the nursing assistants are hourly paid. If the DON is required to work overtime, she is paid a bonus, whereas shift supervisors receive overtime pay.

As noted, at the time of the hearing, the Employer employed two RN shift supervisors and three LPN shift supervisors at the facility. There is one RN/LPN shift supervisor on duty on every shift throughout the week.

The job description of the RN/LPN shift supervisor states that they are responsible for supervising and directing nursing assistants and other RN's and LPN's in the performance of their duties according to physicians' orders and established policies and procedures. The job description further provides that shift supervisors have the authority to grant time off and to allow employees to leave early or arrive late and that they can discipline employees by completing disciplinary forms and submitting them to the department head for review prior to the filing of forms in the employee's personnel file. The job description also states that shift

⁸ The parties stipulated, and I find, that the Administrator and the seven directors reporting to him are supervisory and/or managerial employees, and therefore are excluded from the petitioned-for unit.

⁹ The hours of these individuals are either from 9 a.m. to 5 p.m. or from 7 a.m. to 3:30 p.m.

¹⁰ Cox has an Employer-issued cellular telephone for this purpose. The DON provides RNs and LPNs with three telephone numbers: her home telephone number, a "corporate" number, and her personal cell phone number. The DON requires that the RN/LPN shift supervisors call her when a resident is sent to or returns from the hospital and in case of a resident death.

supervisors can send employees home for serious misconduct such as intoxication, patient abuse or failure to carry out a work assignment.

The record also indicates that the Employer's staffing patterns are the same during the week and on weekends. On each shift the Employer schedules one cook, four dietary aides, four housekeepers, and two laundry aides. The number of nursing assistants on duty varies according to shift. On the day shift, there are five to seven nursing assistants. On the evening shift there are four to six nursing assistants, and on the night shift there are two to four nursing assistants at the facility.¹¹

The nursing assistants are responsible for the daily care of residents.¹² In this respect, the nursing assistants shower, dress, shave, feed and toilet or change the residents. In addition, the nursing assistants are responsible for ensuring that the residents are safe, secure and respected. These duties do not change from day to day.

Both the Administrator and the DON testified that the Administrator and the department directors meet on a daily basis to discuss problems, complaints or issues concerning residents and personnel. The shift supervisor on day shift will be asked to attend a daily morning meeting of the Administrator and the seven directors only if the DON is unable to attend due to vacation or other absence from the facility.

The Employer operates pursuant to a license issued by the Pennsylvania Department of Welfare. The Employer contends that state regulations require that the Administrator or his designee be on site 24 hours per day. Accordingly, the Employer has designated that shift supervisors be in charge of the facility at those times when higher management is not present. According to the Employer, the shift supervisor on duty is responsible for the total care of the

¹¹ The nursing assistants, housekeepers, laundry aides, dietary aides, cooks and van driver are represented by the Petitioner. These employees are covered by a collective-bargaining agreement which is effective by its terms from April 15, 2002, to April 17, 2005.

¹² The record establishes that most of the Employer's residents are elderly individuals who are between 70 and 90 years of age.

residents as well as the physical plant and all staff. However, as noted above, the DON and the Administrator are always available by telephone.

The Employer contends that shift supervisors are responsible for all employees at the facility and have the authority to resolve disputes, discipline employees, including sending them home, and to allow employees to leave early or arrive late. The record reveals that shift supervisors have not had the need to fill vacancies in departments other than the nursing department due to call offs. According to the DON, if such a need arose, the shift supervisor would probably call the department director. With respect to the authority during off shifts to permit employees in the facility to leave work early or come to work late, the record contains no examples of shift supervisors exercising such authority with employees other than nursing assistants. The record contains one specific example of a shift supervisor allowing a nursing assistant to leave the facility for a reason other than illness. In that instance, shift supervisor Meyers allowed a nursing assistant to leave work early when a family member was taken to a hospital. Meyers also stated that she has allowed nursing assistants to go home early due to illness. In such situations, the nursing assistant cannot help residents and therefore is of little use to the shift supervisor. Meyers testified that she has denied a request to leave work early, but the record is silent as to the circumstances.

The Employer also contends that authority assigned to shift supervisors in connection with the Employer's Fire Emergency Procedures establish that shift supervisors are supervisors within the meaning of the Act. The Employer asserts that, in case of fire, the shift supervisor is in charge of the facility.¹³ However, the duties of the shift supervisor are mandated as set forth in the procedure. The Employer's Fire Emergency Procedures states: "In case of a fire or a fire drill, the charge nurse notifies the fire department at 911." The Employer's procedures identify when its fire plan is to be initiated and the specific actions to be taken. The plan informs

¹³ This authority also extends to situations when the Employer has fire drills.

employees at the facility that if an alarm sounds they are to report to the charge nurse in their area for assignment. The assignments for staff are set forth in the plan.

II. DUTIES OF THE RN/LPN SHIFT SUPERVISORS

At the beginning of each shift, the RN/LPN shift supervisor reviews the daily report log which contains all pertinent resident information occurring during the previous shifts. At the end of each shift, the shift supervisor also completes the portion of the report log for her shift to record important information for the following shifts.¹⁴ After reviewing the report log, the shift supervisor advises the oncoming nursing assistants for the following shifts of information relevant to their duties. The shift supervisor then makes assignments of resident rooms to each of the nursing assistants. The shift supervisor makes such assignments either orally, by written handout or by notation on the assignment board.¹⁵ One of the shift supervisors utilizes two typed handout sheets which set forth assignments. One of the sheets is used when there are three nursing assistants on duty, and the other is used when there are four nursing assistants on duty.¹⁶

In addition, the shift supervisor is responsible for dispensing medication to residents. Up to 15 per cent of each shift supervisor's time is spent assisting the nursing assistants with the hands-on care of the residents. The record establishes that RN shift supervisors perform no duties which are not also performed by the LPN shift supervisor, inasmuch as the acuity level of residents in a personal care home does not require any treatment that only an RN can administer.

The nursing assistants are entitled to a lunch break and two fifteen-minute breaks during an eight-hour shift. If there is a disagreement as to the order of lunch periods and breaks, the

¹⁴ The shift supervisor is the only individual who records information in the report log.

¹⁵ The Employer has a board with erasable ink where assignments can be written.

¹⁶ The "3 person assignments" sheet lists three assigned duties for the 1st person, 2nd person and 3rd person. Those duties are "brief changes/room checks", "up & dress" assignment and "showers". The "4 person assignments" sheet lists the same duties but with fewer resident rooms per nursing assistant.

shift supervisor will resolve the dispute. The Employer asserts that the Petitioner recognizes the shift supervisor's authority over the employees in the bargaining unit it represents based on the wording of Article 9.1 of the collective-bargaining agreement.¹⁷ The record does not contain any examples of the shift supervisors denying a request to leave the facility during the lunch or supper period or requiring an employee to work through the lunch or supper period. Likewise, there is no evidence that if such action has occurred the shift supervisor considers any factors other than the staffing levels mandated for the facility.

The record indicates that the Employer has a progressive discipline procedure.¹⁸ In cases of disciplinary actions by a shift supervisor, the recommendation for discipline is submitted to the DON. Inasmuch as shift supervisors do not have access to employee personnel files, the DON determines the level of discipline to be issued consistent with the progressive discipline procedure. The record contains three absentee reports¹⁹ which the Employer asserts are the means by which shift supervisors recommend discipline. The form has spaces for the shift supervisor to check the type of occurrence (i.e. tardy, absent, vacation, layoff), time due at work, actual arrival time and whether the conduct is a continuation of a previously reported absence. The shift supervisor also checks 1 of 21 boxes in the section entitled "Reasons for Occurrence". As to "Recommended Action", the shift supervisor can check one of five actions: "make-up time", "deduct pay", "none", "discipline" or "other".

All three absentee reports in the record were completed by LPN shift supervisor Beverly Meyers. Meyers testified that she does not know whether higher management followed the

¹⁷ Article 9.1 states as follows: "The Employer shall allow a one-half (1/2) hour unpaid lunch or supper period during a shift. The employee will be allowed to leave the facility if staffing levels permit and as authorized by the charge nurse for their lunch and/or supper. If staffing levels do not permit the absence of an employee for the lunch/supper period, the employee will be paid for the period."

¹⁸ According to the DON, the steps of the disciplinary process for employees covered by the collective-bargaining agreement are a verbal warning followed by a written warning, a one-day suspension and then a three-day suspension. According to the DON, different offenses require different disciplinary action. Contrary to the DON's testimony, the progressive discipline process is not contained in the collective-bargaining agreement.

¹⁹ The absentee report is a document that the shift supervisors are required to complete to report attendance.

recommended action noted on the forms. When Meyers completes an absentee report, she submits the form to the DON for decision. The DON testified that when she receives an absentee report she must review the individual's time records to look for repeat patterns of time abuse to determine whether actual disciplinary measures should be considered.

One of the absentee reports involved a nursing assistant identified as Rhonda, who initially called in late due to a school delay, which later was converted to a school closing. Meyers checked the box for discipline in the Recommended Action section of the form. Meyers testified that she checks the box for discipline out of habit, but has checked the box for "other" if she does not know of any other absentee problems involving the employee. The remaining two absentee reports involve Alana Vensel, a former employee who was discharged during her 60-day probationary period. At the hearing, the Employer contended that Vensel was the one nursing assistant whose discharge was recommended by a shift supervisor. One of the absentee reports indicated that Vensel did not call in or show up at work until 11:25 a.m. after being called by an employee identified as Angie. The other absentee report indicates that Vensel called in sick.

According to the Employer, Meyers recommended the termination of Vensel. However, Meyers testified that she made no such recommendation. Moreover, the record established that the administrator employed at the time of the discharge made the final decision to terminate Vensel based on the DON's recommendation. The DON admitted that she made the recommendation based on information from various sources, including Meyers, other shift supervisors, Vensel's peers and conduct which she personally observed.

At the hearing, Meyers recalled recommending discipline for nursing assistants Anna Zatak and Francine Corry. As with the recommendations involving Rhonda and Alana Vensel, Meyers did not know what, if any, action resulted from these recommendations and the record does not contain any information as to the reason for the recommended discipline or what, if any, action was taken by higher management.

The final instance of discipline referred to in the record involved a recommendation by shift supervisor Nancy Niznik that a nursing assistant should be disciplined for insubordination. The DON testified that when this report was submitted to her, she checked the employee's file to determine the level of discipline to be imposed. The DON then presented the warning to the employee in the presence of the Union steward. Shift supervisor Niznik was not present for the issuance of the discipline.

The record also contains a "facility concern report" completed by shift supervisor Meyers which documents a resident's request to prohibit one of the nursing assistants from entering her room. The report indicates that Meyers had another nursing assistant "switch rooms" with the nursing assistant about whom the resident complained. The bottom half of the form contains space to document whether the complaint was discussed at the morning meeting,²⁰ the name of the person to whom the complaint was assigned, the date the matter was "due back to the administrator" and the action taken to solve the problem. The report in the record contains none of this information.

The DON admitted that at times situations involving a resident's request to be attended to by a different nursing assistant will be worked out among the nursing assistants, and that such an action does not require the involvement of a shift supervisor. The DON further admitted that she "interpreted" the information on the facility concern report to indicate that Meyers directed the switching of the two nursing assistants. Meyers was not asked about the facility concern report.

The Administrator and the DON both testified that a shift supervisor is authorized to send employees home in cases of abuse, sleeping on the job, fighting, stealing, intoxication, or if an employee refused to follow directions or caused harm to the physical plant. The record contains one example of a shift supervisor on the evening shift sending a male nursing assistant home for "inappropriate behavior". In that instance, the shift supervisor called the DON after she sent

²⁰ Presumably, the morning meeting refers to the management meeting held at the facility every morning.

the employee home. Although the DON planned to interview the nursing assistant to determine whether follow-up discipline should be imposed, he called the facility the following day and quit his employment.

The Employer asserts that shift supervisors can adjust grievances which involve them at the first step of the grievance procedure. However, the record indicates that the shift supervisor will attend the first step grievance meeting with the DON only if the grievance directly involves the shift supervisor or if the shift supervisor issued the discipline which is the subject of the grievance. The record establishes that all grievance meetings involving nursing assistants are held on the day shift when both the DON and the union steward at the facility are on duty. In addition, the record establishes that the immediate supervisor of all nursing personnel for purposes of the first step of the grievance procedure is the DON.

With respect to minor disputes that arise at the facility, shift supervisor Meyers testified that she intervenes in case of a personality conflict among nursing assistants. In this regard Meyers testified that the nursing assistants come to her and voice their concerns regarding unequal assignments, such as one nursing assistant having more brief or diaper changes than another. At times Meyers has made adjustments in the workload. Meyers stated that in the past she was involved in scheduling breaks in cases where two assistants wanted to take a break at the same time.

The DON testified that shift supervisors can recommend employees for rewards. According to the DON, the rewards take the form of Employer-issued \$25 gift certificates from Giant Eagle grocery store, personal out-of-pocket gifts from the shift supervisor or unpaid time off from work. The record indicates that 20 to 30 Giant Eagle gift certificates have been given to employees at the facility. The record does not indicate over what period of time this has occurred or how many gift certificates have been issued at the suggestion of a shift supervisor. All suggestions by shift supervisors are made to the DON who then takes the recommendation to the Administrator. The Administrator makes the final determination as to the issuance of gift certificates. The record contains one example of an out-of-pocket "reward" from a shift

supervisor to a nursing assistant. In that instance, the nursing assistant was the only nursing assistant to come to work in a severe snowstorm. To show her appreciation, the shift supervisor bought a Car and Driver Magazine for the nursing assistant's son. Although the DON testified generally that shift supervisors can reward nursing assistants by allowing them to clock out early, the record contains no specific instances of shift supervisors allowing employees to go home early as a reward.

In case of call off, the shift supervisor may need to fill the position as staffing needs require. In such cases, the shift supervisor first asks those on duty to volunteer to work overtime. If no one volunteers, the shift supervisor can "mandate" overtime in accordance with the provisions of the collective-bargaining agreement. Thus, the shift supervisor will assign overtime to the least senior employee or employees at the facility. If the assigned employee is unable to accept mandatory overtime, the shift supervisor will assign overtime to the next least senior employee.

A nursing assistant's request to leave work early on a shift other than a weekday daylight shift is directed to the shift supervisor. The shift supervisor grants requests if the nursing assistant is ill, has a personal emergency or if there is an abundance of staff. Employees who leave work early for such reasons are not paid for the remainder of the shift. The record indicates that the DON has informed shift supervisors that employees may go home in these circumstances.

III. SUPERVISORY STATUS OF RN/LPN SHIFT SUPERVISORS

As previously stated, the Employer contends that the RN/LPN shift supervisors at the Employer's facility are supervisors within the meaning of the Act. In so asserting, the Employer contends that the shift supervisors have the authority to suspend, assign, reward, discipline, direct employees, and to adjust their grievances.²¹ The Employer further contends that the state

²¹ The record establishes that the RN/LPN shift supervisors do not have the authority to hire, fire, lay off, recall or promote employees. There was no evidence presented at the hearing nor was there any assertion by the Employer that the shift supervisors have the authority to transfer employees.

regulations under which it operates require that the Administrator or his designee be on site around the clock. Thus, the Employer argues that at night and on weekends when neither the Administrator nor any of the department directors are on site, the RN/LPN shift supervisor is the designee, and at these times the shift supervisor is responsible for the entire building as well as the care of the residents. The Petitioner, on the other hand, asserts that the shift supervisors are not supervisors within the meaning of the Act even under the analysis required by NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706 (2001). As described in more detail below, I find that the Employer has not met its burden of establishing that the RN/LPN shift supervisors are supervisors within the meaning of the Act, and therefore, I shall include them in the unit found appropriate herein.

Section 2(11) of the Act defines the term supervisor as:
[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To meet the definition of supervisor in Section 2(11) of the Act, a person needs to possess only one of the 12 specific criteria listed, or the authority to effectively recommend such action. Ohio Power Co. v. NLRB, 176 F.2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. Harborside Healthcare, Inc., 330 NLRB 1334 (2000).

The burden of proving supervisory status lies with the party asserting that such status exists. NLRB v. Kentucky River Community Care, Inc., supra at 710–712; Michigan Masonic Home, 332 NLRB No. 150, slip op. at 1 (2000). This is a substantial burden in light of the exclusion of supervisors from the protection of the Act. The Board has frequently warned against construing supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. See, e.g., Vencor Hospital – Los Angeles, 328 NLRB 1136, 1138 (1999); Bozeman Deaconess Hospital, 322 NLRB 1107, 1114 (1997). Lack of

evidence is construed against the party asserting supervisory status. Michigan Masonic Home, supra, slip op. at 1. Mere inferences or conclusionary statements without detailed, specific evidence of independent judgment are insufficient to establish supervisory authority. Sears, Roebuck & Co., 304 NLRB 193 (1991).

Moreover, the issue of supervisory status is highly fact-specific and job duties vary; thus, per se rules designating classifications as always or never supervisory are generally inappropriate. Brusco Tug & Barge Co., 247 F. 3d. 273, 276 (D.C. Cir. 2001).

The Board and the courts have observed that the Act sets forth a three-pronged test for determining whether an individual is a supervisor within the meaning of the Act.

Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their 'exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,' and (3) their authority is held 'in the interest of the employer'.

Franklin Hospital Medical Center d/b/a Franklin Home Health Agency, 337 NLRB No. 132, slip op. at 4 (2002), citing NLRB v. Kentucky River Community Care, Inc., supra.

The exercise of "some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner," or through giving "some instructions or minor orders to other employees" does not confer supervisory status. Franklin Hospital Medical Center d/b/a Franklin Home Health Agency, supra at 4, citing Chicago Metallic Corp., 273 NLRB 1677, 1689 (1985).

With regard to the use of independent judgment, it is difficult to analyze whether individuals alleged to be supervisors have the authority to responsibly direct employees within the meaning of Section 2(11) of the Act, particularly in the health care field, since the Board, prior to Kentucky River Community Care, Inc., held that employees are not using independent judgment when they utilize ordinary professional judgment in directing less-skilled employees in accordance with employer-specified standards. This view was rejected by the Supreme Court in Kentucky River Community Care, Inc., supra at 713, finding that this categorical exclusion was overly broad.

However, the Supreme Court did accept two aspects of the Board's interpretation of independent judgment. First, the Court agreed that the term "independent judgment" is ambiguous, and that many nominally supervisory functions may be performed without such a degree of judgment or discretion as to warrant a finding of supervisory status. Second, the Court found that detailed orders and directions from the employer may reduce the degree of judgment exercised below the statutory threshold for supervisory status. *Id.* at 712–714. The Court allowed that the Board has the discretion to make the determination as to whether the degree of judgment utilized reaches the level of independent judgment sufficient to warrant a finding of supervisory status. *Id.*

The Supreme Court did not find that all nurses are supervisors in Kentucky River Community Care, Inc.. Rather, it left it to the Board to analyze the facts of each individual case to determine whether, in light of the findings in Kentucky River Community Care, Inc., the individuals at issue utilize independent judgment. If the judgment being analyzed is constrained by employer-specified standards, or higher authorities have not delegated power to the individuals to make independent decisions, then the judgment may well be routine and not considered supervisory within the meaning of the Act.

As previously stated, contrary to the Petitioner, the Employer contends that the RN/LPN shift supervisors at its facility are supervisors because it asserts that they have the authority to suspend, assign, reward, discipline, responsibly direct employees, and to adjust their grievances.²² Upon the entire record, and in light of the direction of Kentucky River Community Care, Inc., I have concluded that the RN/LPN shift supervisors in this case are not supervisors within the meaning of the Act.

The record establishes, as contended by the Employer, that the shift supervisors are the highest ranking persons present on two shifts during the week and on weekends. However, the

²² As previously noted, the Employer does not assert, either through evidence presented at the hearing or through its brief, that the shift supervisors possess any of the other indicia of supervisory authority enumerated in Section 2(11) of the Act. Consequently, I have not discussed those indicia in this decision.

record also establishes that the Administrator and the DON are always available by telephone. In these circumstances, I conclude that the fact the shift supervisors are nominally “in charge” of the facility during substantial periods of time is insufficient to establish supervisory status. Lakeview Health Center, 308 NLRB 75, 79 (1992); Waverly-Cedar Falls Health Care, 297 NLRB 390, 393 (1989).

The record establishes that shift supervisors assign nursing assistants to attend to residents in specific rooms on each shift. However, the record fails to establish that the shift supervisors exercise independent judgment and discretion in assigning duties to and directing the work of the nursing assistants. Rather, the record establishes that the nursing assistants have standard duties for each resident which do not vary from day to day. The duties involve routine aspects of patient care such as bathing, feeding, shaving and dressing residents, and other routine tasks. The record indicates that the DON completes the master schedule which lists the shift and days that the nursing department employees work. Accordingly, I conclude that the shift supervisors do not exercise supervisory authority in assigning and directing the work of the nursing assistants. Northern Montana Health Care Center, 324 NLRB 752, 753 (1997); Providence Hospital, 320 NLRB 717 (1996).²³

The record establishes that the shift supervisors have the authority to modify the break and lunch schedules of nursing assistants. However, the record establishes that they exercise such authority only in response to the necessities of resident care needs. This limited authority is routine in nature and does not require the exercise of independent judgment or discretion. It

²³ In NLRB v. Attleboro Associates, 176 F.3d 154 (3d Cir. 1999), the Court of Appeals for the Third Circuit found that LPNs employed at a nursing home were supervisors within the meaning of the Act because they had the authority, inter alia, to use independent judgment in assigning work to, and directing the work of, aides on a daily basis. Unlike the LPNs in Attleboro, it does not appear that the shift supervisors at issue herein assign work to, and direct the work of, nursing assistants to any significant degree. Moreover, the Board has stated that it will continue to adhere to the principles set forth in Providence Hospital, 320 NLRB 717 (1996), concerning the supervisory status of charge nurses, notwithstanding the decisions of certain circuit courts of appeal to the contrary. Vencor Hospital-Los Angeles, 328 NLRB 1136, 1138, fn. 9 (1999). Moreover, the Supreme Court, in Kentucky River Community Care, Inc., citing Providence Hospital approvingly, recognized that certain judgments may well be routine and not considered supervisory within the meaning of the Act.

is therefore insufficient to constitute the exercise of supervisory authority. Parkview Manor, 321 NLRB 477, 478 (1996); Ten Broeck Commons, 320 NLRB 806 (1996).

The DON testified that shift supervisors have the authority to recommend discipline of nursing assistants and to send them home.²⁴ However, the DON also testified that only she has access to employees' personnel files. Moreover, although shift supervisors could report what happened to determine what type of offense was involved, they could not determine the appropriate penalty for the infraction, and no discipline could be imposed without the involvement of the DON. In these circumstances, I conclude that the role the shift supervisors play with respect to discipline is essentially reportorial in nature and is insufficient to confer supervisory status. All of the absence reports in the record fail to indicate what, if any, discipline was in fact imposed. Thus, the record fails to establish that the shift supervisors have authority to issue discipline that independently results in adverse action to the nursing assistants without further review by higher authority. Washington Nursing Home, 321 NLRB 366, fn. 4 (1996).

The shift supervisors will authorize overtime when needed to maintain adequate staffing. The record establishes that the shift supervisors follow a defined procedure of initially requesting volunteers, followed by requiring overtime utilizing the contractual provision in the collective-bargaining agreement regarding overtime. The exercise of such limited authority does not involve independent judgment or discretion and is therefore insufficient to establish supervisory status. Northern Montana Health Care Center, supra at 753, fn. 9; Lakeview Health Center, supra at 79. The record establishes that the shift supervisors have the authority to allow nursing assistants to leave early in defined circumstances. This authority is routine in nature and is insufficient to establish supervisory status. Washington Nursing Home, supra at 366, fn. 4. As to recommending rewards for employees, the record establishes that such suggestions are initially presented to the DON, who then presents them to the Administrator for final

²⁴ The record reveals no other evidence in support of the Employer's assertion that the shift supervisors have authority to suspend employees.

determination. The recommendation as to irregular and minor rewards which cannot be granted without approval from higher authority is insufficient to confer supervisory status.

The record establishes that shift supervisors have the authority to resolve minor disputes among nursing assistants. However, there is no evidence that the shift supervisors play more than a minor role in connection with grievances filed pursuant to the collective-bargaining agreement. Rather, the DON conducts the first step meeting and is considered the immediate supervisor of all nursing department employees. In these circumstances, I conclude that the record evidence is insufficient to establish that the shift supervisors have the authority to independently adjust grievances. Northern Montana Health Care Center, supra at 754; Riverchase Health Care Center, 304 NLRB 861, 865 (1991).²⁵

IV. FINDINGS AND CONCLUSIONS

Based upon the entire record in this matter and in accordance with the discussion above, I find and conclude as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

²⁵ Passavant Retirement & Health Center v. NLRB, 149 F.3d 243 (3d Cir. 1998), relied upon by the Employer in its brief, involved the nurses' resolution of complaints which could ripen into grievances cognizable under the collective-bargaining agreement covering the CNAs. In contrast, in the instant case, the shift supervisors are merely giving routine direction of work, rather than informally resolving disputes that would constitute contractual grievances. In this regard, the court emphasized that the definition of "grievance" contained in the collective-bargaining agreement in that case was very broad and the agreement included sections pertaining to daily assignments, break times, lunch breaks and the like, matters which the nurses in Passavant could resolve and adjust when disputes arose among the aides with respect to these matters. In the instant case, it appears that the nursing assistants and shift supervisors collaboratively resolve such minor problems. See Ken-Crest Services, 335 NLRB No. 63, slip op. at 2-3 (2001) wherein the Board distinguished Passavant on the ground that the record therein indicated that the program directors alleged to be supervisors only offered advice and suggestions regarding personality conflicts. In addition, in this case there are no fixed times for rest periods or meal breaks. Indeed, the contract provides that staffing levels determine whether employees may be required to forego a meal break. I also note that the first step of the contractual grievance procedure provides that the grievant and/or the union steward shall meet with the grievant's immediate supervisor. For nursing department employees, the immediate supervisor is the DON. Thus, I find Passavant to be factually distinguishable from the present case.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this matter.

3. The Petitioner claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer may constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time registered nurses (RNs) and licensed practical nurses (LPNs) employed by the Employer at its Pittsburgh, Pennsylvania, facility; excluding office clerical employees and guards and supervisors as defined in the Act.

The unit set out above includes professional²⁶ and non-professional employees. However, the Board is prohibited by Section 9(b)(1) of the Act from including professional employees in a unit with employees who are not professionals unless a majority of the professional employees vote for inclusion in such a unit. Accordingly, I must ascertain the desires of the professional employees as to the inclusion in a unit with non-professional employees.

I shall therefore direct separate elections²⁷ in the following voting groups:

VOTING GROUP A: All full-time and regular part-time registered nurses (RNs) employed by the Employer at its Pittsburgh, Pennsylvania, facility; excluding licensed practical nurses (LPNs), office clerical employees and guards and supervisors as defined in the Act.

VOTING GROUP B: All full-time and regular part-time licensed practical nurses (LPNs) employed by the Employer at its Pittsburgh, Pennsylvania, facility; excluding registered nurses (RNs), office clerical employees and guards and supervisors as defined in the Act.

²⁶ At the hearing, the parties stipulated that the RNs are professional employees.

²⁷ Sonotone Corporation, 90 NLRB 1236 (1950).

The employees in the non-professional voting group (B) will be polled to determine whether or not they wish to be represented by the Union.

The employees in voting group (A) will be asked two questions on their ballot:

- (1) Do you desire to be included with non-professional employees in a unit composed of all full-time and regular part-time registered nurses (RNs) and licensed practical nurses (LPNs) employed by the Employer; excluding office clerical employees and guards and supervisors as defined in the Act, for the purposes of collective bargaining?
- (2) Do you desire to be represented for the purposes of collective bargaining by United Food and Commercial Workers International Union, Local 23, AFL-CIO, CLC?

If a majority of the professional employees in voting group (A) vote “yes” to the first question, indicating their wish to be included in a unit with non-professional employees, they will be so included. Their vote on the second question will then be counted together with the votes of the non-professional voting group (B) to determine whether or not the employees in the whole unit wish to be represented by the union. If, on the other hand, a majority of professional employees in voting group (A) vote against inclusion, they will not be included with the non-professional employees. Their votes on the second question will then be separately counted to determine whether or not they wish to be represented by the Union.

My unit determination is based, in part, then, upon the results of the election among the professional employees. However, I now make the following findings in regard to the appropriate unit:

1. If a majority of the professional employees vote for inclusion in the unit with non-professional employees, I find that the following will constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time registered nurses (RNs) and licensed practical nurses (LPNs) employed by the Employer at its Pittsburgh, Pennsylvania, facility; excluding office clerical employees and guards and supervisors as defined in the Act.

2. If a majority of the professional employees do not vote for inclusion in the unit with non-professional employees, I find that the following two groups of employees will constitute separate units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

VOTING GROUP A: All full-time and regular part-time registered nurses (RNs) employed by the Employer at its Pittsburgh, Pennsylvania, facility; excluding licensed practical nurses (LPNs), office clerical employees and guards and supervisors as defined in the Act.

VOTING GROUP B: All full-time and regular part-time licensed practical nurses (LPNs) employed by the Employer at its Pittsburgh, Pennsylvania, facility; excluding registered nurses (RNs), office clerical employees and guards and supervisors as defined in the Act.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the voting groups set forth above. The employees will vote in the manner set forth above whether or not they wish to be represented for purposes of collective bargaining by United Food and Commercial Workers International Union, Local 23, AFL-CIO, CLC. The date, time and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those employees in the voting groups who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees

engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Room 1501, 1000 Liberty Avenue, Pittsburgh, PA 15222, on or before **April 1, 2003**. No extension of time to file this list will be granted, except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may

be submitted by facsimile transmission at 412/395-5986. Since the list will be made available to all parties to the election, please furnish a total of **two (2)** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of three (3) full working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least five (5) full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so precludes employers from filing objections based on non-posting of the election notice.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST (EDT), on **April 8, 2003**. The request may **not** be filed by facsimile.

Dated: March 25, 2003

/s/Gerald Kobell

Gerald Kobell, Regional Director

NATIONAL LABOR RELATIONS BOARD
Region Six
Room 1501, 1000 Liberty Avenue
Pittsburgh, PA 15222

Classification Index
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